Kesang Leasing Sdn Bhd v Dato' Haji Mat @ Mat Shah bin Ahmad & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–193 OF 1996
MOHD HISHAMUDIN J
28 JANUARY 2009

Civil Procedure — Parties — Proper plaintiffs — Plaintiff's claim against first defendant — Alleged wrongdoing by first defendant towards third party — Whether third party proper plaintiff

Companies and Corporations — Directors — Breach of director's duties — Claim for damages by plaintiff — Whether liability towards another entity — Whether action commenced by wrong entity

Land Law — Indefeasibility of title and interests — Registered owner — Allegation of wrongful transfer of land from plaintiff to third parties — Plaintiff failed to prove ownership — Whether could be deprived of something not owned — Whether claim valid

The plaintiff's claim against the first defendant was for damages for breach of fiduciary duty as a director of the plaintiff's company. The plaintiff alleged that the first defendant together with three others had caused two apartments in Tanjung Tuan Port Dickson that it owned, to be transferred from the plaintiff to Kesang Corporation Bhd ('KCB') and then to third parties. The apartments were allegedly bought from a company known as Tanjung Tuan Resort Development Sdn Bhd. The trial was subsequently commenced and concluded and directions were issued by the learned judge for the filing and serving of written submissions. The first defendant, who was earlier adjudged bankrupt, had applied to reopen the trial to cross-examine the plaintiff's witness upon annulment of his receiving order and adjudication order. The application was disallowed on the grounds, inter alia, that the trial had been concluded and awaiting court's decision; that the first defendant had failed to attend trial without valid reasons and that the first defendant did not apply promptly when he ceased to be a bankrupt. However, the first defendant was allowed to file and serve written submission with respect to the trial.

Held, dismissing the plaintiff's claim with costs:

(1) There were no documents of title tendered to show that the plaintiff was at the material time the registered owner of the apartments. One could not be deprived of a property which one never had in the first place. By failing to tender the evidence of the strata titles pertaining to the apartments, the plaintiff had failed to show that it was, at the material time, the owner of the apartments. There was also no evidence tendered to prove that Tanjung Tuan Resort Development Sdn Bhd was the registered owner of the two apartments. One cannot legally sell something that one does not legally own unless as an agent on behalf of the principal/legal owner, which was not the case here (see paras 32–34).

(2) The plaintiff had failed to prove that the original copy of the sale and purchase agreement was missing or that reasonable effort had been taken by the plaintiff to obtain the original copy. As such it could not rely on s 65(1)(c) of the Evidence Act 1950 to prove its ownership of the apartments (see para 42).

(3) The subject matter of the plaintiff's complaint was not the alleged transfer of the two apartments from the plaintiff to KCB but the alleged transfer of the two apartments from KCB to third parties. If the alleged transfer of the apartments to the third parties was allegedly a wrong doing by the first defendant with the other defendants by virtue of their position as directors of KCB then, it was a wrong doing by the first defendant (as well as by the other defendants) to KCB and not to the plaintiff. Therefore, KCB should have been the plaintiff in the present case, and not Kesang Leasing Sdn Bhd (see para 50).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan pertama adalah untuk ganti rugi terhadap kemungkiran kewajipan fidusiari sebagai pengarah syarikat plaintif. Plaintif mendakwa bahawa defendan pertama bersama-sama dengan tiga yang lain telah menyebabkan dua pangsapuri-pangsapuri di Tanjung Tuan Port Dickson yang dimilikinya, dipindah milik daripada plaintif kepada Kesang Corporation Bhd ('KCB') dan kemudian kepada pihak ketiga. Pangsapuri-pangsapuri tersebut dikatakan dibeli daripada sebuah syarikat yang dikenali sebagai Tanjung Tuan Resort Development Sdn Bhd. Perbicaraan kemudiannya dimulakan dan ditamatkan dan arahan-arahan diberikan oleh hakim yang bijaksana untuk pemfailan dan penyerahan penghujahan bertulis. Defendan pertama yang pada mulanya diputuskan sebagai bankrap, telah memohon untuk membuka semula perbicaraan untuk memeriksa balas saksi plaintif selepas pembatalan perintah penerimaan dan perintah penghakiman. Permohonan tersebut ditolak atas alasan, antara lain,

bahawa perbicaraan telah ditamatkan dan menunggu keputusan mahkamah; bahawa defendan pertama telah gagal hadir untuk perbicaraan tanpa alasan yang munasabah dan bahawa defendan pertama tidak memohon segera apabila tidak lagi menjadi bankrap. Walau bagaimanapun, defendan pertama dibenarkan untuk memfailkan dan menyerahkan penghujahan bertulis berkaitan dengan perbicaraan tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Tidak ada dokumen hak milik dikemukakan untuk menunjukkan bahawa plaintif adalah pada masa material pemilik berdaftar pangsapuri-pangsapuri tersebut. Seseorang tidak boleh dilucut hak (deprived) daripada hartanah yang tidak pernah dimilikinya. Dengan kegagalan untuk mengemukakan keterangan hak milik strata berkenaan dengan pangsapuri-pangsapuri tersebut, plaintif telah gagal untuk menunjukkan bahawa ia adalah, pada masa material, pemilik pangsapuri-pangsapuri tersebut. Juga tiada keterangan dikemukakan untuk membuktikan bahawa Tanjung Tuan Resort Development Sdn Bhd adalah pemilik berdaftar kedua-dua pangsapuri tersebut. Seseorang tidak boleh dari segi undang-undang menjual sesuatu yang tidak dimilikinya secara sah kecuali sebagai agen bagi pihak prinsipal/pemilik sah, yang bukan merupakan kes di sini (lihat perenggan 32–34).

(2) Plaintif telah gagal untuk membuktikan bahawa salinan asal perjanjian jual beli telah hilang atau usaha yang munasabah telah diambil oleh plaintif untuk mendapatkan salinan asal. Oleh itu ia tidak boleh bergantung pada s 65(1)(c) Akta Keterangan 1950 untuk membuktikan milikannya terhadap pangsapuri-pangsapuri tersebut (lihat perenggan 42).

(3) Perkara aduan plaintif bukan dakwaan pindah milik kedua-dua pangsapuri tersebut daripada plaintif kepada KCB tetapi dakwaan pindah milik kedua-dua pangsapuri tersebut daripada KCB kepada pihak ketiga. Jika dakwaan pindah milik pangsapuri-pangsapuri tersebut kepada pihak ketiga adalah dikatakan salah laku oleh defendan pertama bersama dengan defendan-defendan yang lain dalam kedudukan mereka sebagai pengarah KCB, oleh itu ia adalah salah laku oleh defendan pertama (dan juga defendan-defendan yang lain) terhadap KCB dan bukan terhadap plaintif. Oleh itu, KCB sewajarnya menjadi plaintif di dalam kes ini, dan bukan Kesang Leasing Sdn Bhd (lihat perenggan 50).]

Notes

For cases on breach of director's duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 189–192.

A For cases on proper plaintiffs, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5138–5139.

For cases on registered owner, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2980–2983.

B **Cases referred to**

Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715, CA (refd)

Legislation referred to

C Bankruptcy Act 1967 ss 8(1), 38(1)(a)
Evidence Act 1950 ss 64, 65(1)(c)

S Shamalah (De Silva) for the plaintiff.
Deepinder Kaur (David Lingam & Co) for the first defendant.
D *Zahari Mohd Nor (Senior Federal Counsel) for the Director General of Insolvency.*

Mohd Hishamudin J:

E

[1] In this suit, the plaintiff's claim, presently, is only against the first defendant, Dato' Haji Mat Shah bin Ahmad. The plaintiff's claims against the second, third and fourth defendants have previously been withdrawn.

F **[2]** The plaintiff's claim against the first defendant is for damages for breach of fiduciary duty as a director of the plaintiff company.

[3] The trial of the present case began on 21 March 2005. However, while the trial was still ongoing, the first defendant was adjudged a bankrupt on
G 11 July 2005. The plaintiff applied for and obtained leave of the Bankruptcy Court on 23 January 2007 to proceed against the first defendant pursuant to s 8(1) of the Bankruptcy Act 1967. On 30 March 2007 when the case was called up for continued hearing, with the officer from the office of the director general of insolvency being present for the trial, a counsel, Mr David
H Lingam, informed the court that he had been engaged by the first defendant to represent him and that the first defendant had applied to the Director General of Insolvency for sanction pursuant to s 38(1)(a) of the Bankruptcy Act to defend the action and to retain Messrs David Lingam & Co as his solicitors and Mr David Lingam as his counsel. The case was then adjourned
I to 2 July 2007 for the court to make a ruling on a point of law (for the purpose of the present application it is unnecessary for me to state here what the point of law is). However, on 2 July 2007 the court having made the ruling, directed that the continuation of the trial be held on 13 September 2007 and that if by that date no sanction of the director general of insolvency

was obtained by the first defendant, then the court will proceed with the trial with the Director General of Insolvency as the defendant, and that, if the Director General of Insolvency on that date was desirous of defending the action, he ought to be ready to proceed with the trial.

[4] Now, on 13 September 2007 both senior federal counsel (Encik Zahari Mohd Nor, representing the Director General of Insolvency) and Encik Sadacharam Raman who appeared as amicus curiae on behalf of first defendant applied for an adjournment. Encik Zahari Mohd Nor, senior federal counsel, applied for an adjournment on the grounds, firstly, that the first defendant's application for sanction was still being processed by the Director General of Insolvency's department, and, secondly, that he was in no position to proceed with the trial as the first defendant had failed to present himself at his (senior federal counsel's) office and had not been cooperative. Encik Zahari disclosed to the court that the proper application for sanction was submitted by the first defendant to the Director General of Insolvency very late, that is to say, it was submitted only on 10 September 2007, just three days before the trial continuation date of 13 September 2007. And even then it was only submitted after a reminder had been sent by the director general to the first defendant's solicitors, Messrs David Lingam on 20 July 2007. The senior federal counsel added that apart from the pleadings he did not have with him the full set of documents pertaining to the case. Encik Sadacharam, on his part, applied for an adjournment on the grounds that the first defendant was still awaiting the Director General of Insolvency's sanction, and, secondly, the first defendant was unwell to attend court. Encik Sadacharam tendered a medical certificate which he said he received from the first defendant's office.

[5] Learned counsel for the plaintiff, Cik Tricia Mallika Appaduray, opposed the application for adjournment.

[6] I disallowed the application for adjournment and directed the trial to proceed.

[7] Now on that day (13 September 2007) the trial was to continue with senior federal counsel cross-examining the plaintiff's only witness. Senior federal counsel frankly informed the court that he was ill-prepared for the case (for the reasons that I have mentioned earlier) and thus was in no position to cross-examine the witness. Counsel for the plaintiff then proceeded to re-examine the witness. That witness was the only witness for the plaintiff. The plaintiff then closed its case.

[8] After the plaintiff had closed its case, senior federal counsel informed the court that he was in no position to proceed with the defence as the first

defendant was on medical leave and that he had no other witnesses. Under the circumstances, I then deemed the trial as concluded and issued directions for the filing and serving of written submissions, and I fixed 4 February 2008 as the date of decision.

[9] Meanwhile, the receiving order and the adjudication order against the first defendant were annulled by the Bankruptcy Court on 15 November 2007.

[10] However, on 4 February 2008 I did not deliver my decision. This is because on that day, at the commencement of the proceeding, learned counsel for the first defendant informed the court that the receiving order and adjudication order against first defendant had been annulled by the Bankruptcy Court on 15 November 2007 and that the first defendant now wished to apply to reopen the case to cross-examine the plaintiff's witness and thereafter to present the defendant's case. Counsel applied that I deferred my decision. I agreed to do so.

[11] Subsequent, on 17 April 2008, the first defendant made an application by way of summons in chambers (encl 105) for the trial to be reopened and that the first defendant be given the opportunity to further cross-examine the plaintiff's witness PW1.

[12] After considering submissions of parties, I disallowed the application.

[13] I disallowed the application on the following grounds.

[14] Firstly, the trial had already been concluded on 13 September 2007 and only awaiting decision of the court. At the continuation of the trial on 13 September 2007, the defence (the defendant then being the Director General of Insolvency, as the first defendant was still a bankrupt) did not call any witness. Subsequently, in accordance with the directions of the court given at the conclusion of the trial on 13 September 2007, written submissions by the counsel for the plaintiff as well as by senior federal counsel/Director General of Insolvency (who represented the first defendant at the material time as the first defendant was a bankrupt) had been filed and served. What only was left was for the court to deliver its decision on 4 February 2008. However, on 4 February 2008 the court did not deliver its decision for the reason which I had already explained.

[15] The broad principle as to how the court is to exercise its discretion in such a situation as the present is enunciated by the Court of Appeal in *Tan*

Kah Kiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715. In this case, Gopal Sri Ram JCA, in delivering the judgment of the court of appeal, states (p 452 (MLJ)):

> For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that a discretion may be exercised at the stage where the application is made immediately after a party closes its case. But it may be less likely that a discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[16] In the present case, it is pertinent to observe that although the defence closed its case on 13 September 2007 and that the first defendant ceased to be a bankrupt on 15 November 2007 yet the present application was not made by the first defendant promptly: it was not made until 17 April 2008 when the present application was filed. No satisfactory explanation is furnished by the first defendant for this long delay in filing encl 105. In para 20 of his supporting affidavit, the first defendant gives the reason for the delay in making the application as follows:

> 20 Jika terdapat apa-apa kelewatan dalam membuat permohonan ini (yang mana dinafikan), ia adalah disebabkan oleh masa yang diambil oleh saya untuk membatalkan Perintah-perintah Penerimaan dan Penghukuman terhadap saya dan seterusnya mengarahkan Peguamcara saya untuk membuat permohonan ini.

[17] The above cannot be the true reason for the delay because the first defendant obtained the annulment order from the Bankruptcy Court as early as 15 November 2007.

[18] Secondly, as can be seen from the notes of the evidence for the proceeding on 13 September 2007 learned senior federal counsel, representing the Director General of Insolvency, had informed the court that he was unable to proceed with the trial as the first defendant had not been cooperative and had never presented himself at the senior federal counsel's office to discuss the case.

[19] Thirdly, the first defendant has shown no interest to proceed with the action. He was absent on 13 September 2007 without a valid reason. The trial was supposed to continue on that day. However, the first defendant on that day tendered a medical certificate. But I found the medical certificate tendered through counsel, Mr Sadacharam Raman, who appeared as amicus

curiae, wanting and hence unacceptable. As documentary evidence, the alleged medical certificate lacks credibility. Firstly, the medical certificate was not clear as to the nature of the first defendant's alleged illness. Secondly, the doctor who issued the medical certificate was not called to explain as to why the first defendant was unfit to attend court. Thirdly, the medical certificate itself does not say that the first defendant was not fit to attend court: for limb (c) of the medical certificate merely says:

> (c) Beliau tidak sihat untuk menjalankan tugasnya dengan sempurna pada/daripada 12/9/07 hingga 13/9/07 selama (Dua) hari.

[20] Fourthly, the medical certificate is ambiguous. To begin with, the first defendant seems to be relying on limb (c) of the medical certificate. But, importantly limb (a) of the medical certificate says:

> (a) Beliau boleh menjalankan tugas,

[21] Now, it is significant to note that this limb (a) of the medical certificate, unlike limb (b) of the same, was not deleted by the issuing authority. Limb (b) reads:

> (b) Beliau boleh menjalankan tugas terhad, … (sila nyatakan) pada/daripada … hingga … selama … (…) hari.

[22] This limb (b) was deleted by the issuing authority. Now, if limb (b) of the medical certificate could be and was in fact deleted by the authority issuing the medical certificate, why wasn't limb (a) deleted as well? The fair inference to make is that the issuing authority had no intention of deleting limb (a). It then follows that if the first defendant was 'fit to carry out his duties', then there was no reason for him to be absent from court! But if this is the case, how does one reconcile limb (a) with limb (c)!

[23] The first defendant in his supporting affidavit now states that he was unable to attend court on that day because he had a high fever. I am unable to accept this assertion because this was the first time that the court was informed of this reason. If indeed he was having a high fever on 13 September why didn't the doctor say so in the medical certificate in no uncertain terms; or, why didn't Mr Sadacharam say so in court on 13 September? But in the first place why wasn't the medical certificate tendered through senior federal counsel who represented the Director General of Insolvency; why was it tendered merely through an amicus curiae? If indeed he was unfit to attend court on that day, and since on that day the first defendant was still a bankrupt, wasn't the Director General of Insolvency

(or senior federal counsel) the appropriate person for the first defendant to inform and to hand over his medical certificate? A

[24] But it is pertinent to note that it was not only on this date (30 September 2007) that the first defendant failed to attend trial without a valid reason. Previously the first defendant had absented himself from court on three occasions without a valid reason, although in respect of each of the occasions he had been previously informed in writing by the court to attend the court proceedings. The dates are 18 December 2006 (for continued hearing), 5 February 2007 (for mention), and 30 March 2007 (for continued hearing). B C

[25] Now, although I had disallowed the first defendant's application to reopen the trial, nevertheless, recognising the fact that the first defendant had now ceased to be a bankrupt, I had allowed his counsel to file and serve a written submission with respect to the full trial; and counsel had done so. And to accommodate the first defendant, I had also fixed a new decision date that is 9 January 2009. D

[26] On 9 January 2009 I dismissed the plaintiff's claim against the first defendant with costs. E

[27] The following are my grounds. F

[28] The evidence of the plaintiff on the whole is weak such that the plaintiff had failed to prove its case against the first defendant. The plaintiff called only one witness namely Encik Uthaya Kumar a/l Marimuthu ('PW1'). He was the assistant general manager, Legal Affairs of Damansara Realty Bhd's group of companies, a position which he holds since 1999. PW1 is also the director of the plaintiff — also since 1999. But this witness has no personal knowledge as to what had transpired or of the alleged events and transactions that took place in 1992 involving the properties in question. He merely relied on documents which I find are either inadmissible or of no probative value. G H

[29] I shall elaborate.

[30] The plaintiff claims that it owned two apartments in Tanjung Tuan, Port Dickson. The apartments are the subject-matter of the present action. The plaintiff alleges that the first defendant unlawfully and in breach of his fiduciary duty as a director of the plaintiff had caused the two apartments to be transferred to third parties. I

[31] Did the plaintiff own the two Tanjung Tuan apartments at the material time? In para 12(a) of the statement of claim, the plaintiff claims:

(a) Plaintiff adalah merupakan pemilik sah harta-harta tersebut.

[32] The above averment implies that the plaintiff was the registered owner of the apartments. However, there are no documents of title tendered to show that the plaintiff was at the material time the registered owner of the apartments. One cannot be deprived of a property which one never had in the first place. By failing to tender in evidence the strata titles pertaining to the apartments, the plaintiff had failed to show that it was, at the material time, the owner of the apartments.

[33] The plaintiff, however, claims that it was the purchaser of the apartments. The plaintiff claims that it bought the apartments from a company known as Tanjung Tuan Resort Development Sdn Bhd (please refer to para 9 of the statement of claim). This claim must also be dismissed as being unproven.

[34] In the first place, there is no evidence to prove that Tanjung Tuan Resort Development Sdn Bhd was the registered owner of the two apartments. No strata titles were tendered by the plaintiff to show that Tanjung Tuan Resort Development Sdn Bhd was the registered owner of the two apartments. If Tanjung Tuan Resort Development Sdn Bhd ('Tanjung Tuan Resort') was not the registered owner of the two apartments, then how could it have legally sold the apartments to the plaintiff? One cannot legally sell something that one does not legally own – unless one is selling as an agent on behalf of a principal/legal owner, which is not the case here.

[35] PW1 testified:

Q22: Were the strata titles for the said apartments issued at the time of the purchase?

A22: No, in fact I believe that to date the strata titles for the 2 units have not been issued.

[36] A significant omission in PW1's evidence is that PW1 does not explain the basis of his 'belief' that from 1987 (the alleged date of purchase of the apartments by the plaintiff) right until the date of the trial (2005) no strata titles have been issued in respect of the two apartments. PW1 should have explained to the court as to why 18 years after the date of the purchase there

were still no strata titles issued. In the absence of such an explaination the court cannot accept PW1's assertion that there were no strata titles issued for the apartments.

[37] In the present case, however, the plaintiff is largely relying on two sale and purchase agreements pertaining to the two apartments in order to show its 'ownership' of the apartments. Now, this being the case, it is incumbent upon me to examine these two documents and to determine their admissibility and to assess their probative value as documentary evidence.

[38] I shall begin with the documentary evidence marked as exh P2. Exhibit P2 is the sale and purchase agreement between the plaintiff and Tanjung Tuan Resort in respect of the apartment having the address A10-4. In my judgment exh P2 as a piece of documentary evidence, is devoid of any evidential value. Firstly, it is merely a photocopy. But there is no evidence as to who had made the photocopy. PW1 was not the person who made the photocopy or who had any knowledge as to the photocopying or as to the existence of the original copy. PW1, in his evidence, merely said:

Q15: Where are the original copies of the 2 sale and purchase agreements?

A15: I have tried looking for them. I have had our staff go through all of our documents, files and cabinets in search of the 2 agreements but have been unsuccessful in locating the originals. In so far as Unit A5-4 is concerned, I believe that the original copy would be in the possession of Bank of Commerce as part of their security documentation. The agreement for unit A10-4 cannot be found. I do not know what happened to the original.

[39] Since the original copy of the sale and purchase agreement could not be found, a glaring omission in PW1's evidence is that there is no explanation as to how PW1 came to be in possession of the photocopy, exh P2. Where did PW1 find exh P2? Or, who gave exh P2 to him? These vital information are missing. Further, at p 11 of the document, in the First Schedule, the date of the agreement was left blank. This blank is left unexplained. So the document is not only weird, one does not know actually when the agreement was executed.

[40] During the trial, the first defendant's counsel had objected to the admissibility of exh P2 on the ground that it is merely a photocopy. But, after hearing submissions, I had overruled the objection. Now, upon reflection, I think, I was wrong in admitting exh P2 considering that that it was merely a photocopy. PW1 should have produced the original sale and purchase

agreement. As a general rule, documents must be proved by primary evidence. Section 64 of the Evidence Act 1950 stipulates:

> 64 Proof of documents by primary evidence.
>
> Documents must be proved by primary evidence except in the cases hereinafter mentioned.

[41] The plaintiff's counsel, in urging me to admit exh P2, relied on s 65(1)(c) of the Evidence Act 1950 which states:

> 65 Cases in which secondary evidence relating to documents may be given.
>
> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> ...
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

[42] In the present case, upon reflection, I do not think sufficient evidence have been adduced by the plaintiff to prove that the original copy had been lost, particularly, considering that the plaintiff had called only one witness, namely PW1, to prove the loss of the original copy. No other officer involved in the search for the original was called by the plaintiff to furnish details of the alleged efforts taken by the plaintiff to trace or to retrieve the original copy. In particular, the officer in the plaintiff's organisation who normally would have had responsibility over the custody of such an important document as exh P2, should have been called to explain as to how and when the original of P2 went missing. A mere general statement by PW1 that a search had been carried out by the company's staff on files and cabinets, but was unsuccessful in locating the documents, is insufficient. Furthermore, if, indeed, Tanjung Tuan Resort was the vendor of the A10-4 apartment, as alleged by the plaintiff, then that company would also have in its possession a copy of the original copy of the sale and purchase agreement. Yet, there was no evidence adduced that the plaintiff had tried contacting Tanjung Tuan Resort to obtain from that company a copy of the original. In short, the plaintiff has failed to prove that the original was missing or that reasonable efforts had been taken by the plaintiff to obtain the original copy. This being the case, the plaintiff cannot rely on s 65(1)(c) of the Evidence Act.

[43] I shall now move on to the second alleged sale and purchase agreement marked as exh ID3. This sale and purchase agreement is in respect of the

other Tanjung Tuan apartment with the address A5-4. Just like exh P2, this alleged sale and purchase agreement is equally weird: it does not have a date of its execution. Like exh P2, section 1 of the First Schedule, which is to state the date of the agreement, was just left blank. I had ruled this sale and purchase agreement as inadmissible, and, hence, should be marked only as 'exh ID3'. I had ruled exh ID3 as inadmissible as it is merely a photocopy, and the plaintiff had not provided the court with a good reason as to why the original copy of the sale and purchase agreement could not be obtained from the Bank of Commerce (PW1 had given evidence that the original copy of ID3 was in possession of the Bank of Commerce as a security document).

[44] Since the plaintiff has failed to tender the strata titles in respect of the two apartments, and since I have ruled that the two sale and purchase agreements are inadmissible (or even if one of them, exh P2, is admissible, it is devoid of any probative value) the plaintiff has, therefore, failed to prove its ownership of the apartments.

[45] Accordingly, the plaintiff's claim must fail.

[46] There is, however, another piece of documentary evidence which the plaintiff relies upon to prove that it is the owner of the two apartments. That document is pp 79–9 of bundle B. This bundle is marked 'AGREED COMMON BUNDLE — NORMAL'. This means parties had agreed that the maker of the documents in the Bundle need not be called to prove the admissibility of the documents, but the contents of the documents are disputed. The document in question has a heading that reads:

TANJUNG TUAN APARTMENT

LIST OF PURCHASERS

[47] Item 44 of the above list states that the purchaser of unit A5-4 was 'Kesang Leasing S/B' and that the date of the purchase was 10 February 1987. Item 94 of the above list states that the purchaser of unit A10-4 was 'Kesang Leasing Sdn Bhd' and that the purchase date was 10 February 1987. This document does not state who the vendor/vendors was/were. This document was furnished to the plaintiff's solicitors by the first defendant's solicitors for the purpose of another suit. This document is undated. There is no evidence as to who had prepared this document and as to the purpose of the document. In my view, this document is insufficient to prove that the plaintiff was the owner of the apartments.

[48] Finally, para 12(b) of the statement of claim states:

> (b) Harta-harta tersebut telah dipindah milik kepada pihak ketiga tanpa plaintif mendapatkan sebarang ganjaran yang setimpal bagi pindah milik tersebut, dan/atau pindah milik tersebut adalah berlawanan dengan kepentingan plaintif.

[49] On the basis of the above averment, the real complaint of the plaintiff lies in the alleged transfer of the two apartments to *third parties*. But the alleged transfer of the two apartments to the third parties was allegedly done by an entity known as Kesang Corporation Bhd and not by the first defendant. And they were transferred by Kesang Corporation Bhd to the third parties only *after* they had been transferred to Kesang Corporation Bhd from the plaintiff company allegedly by the defendants. Paragraphs 10 and 11 of the statement of claim state:

> 10. Pada 31 Ogos 1992 pula, tanpa sebarang resolusi lembaga pengarah dan tanpa mendapatkan sebarang munafaat kepada urusan perniagaan plaintif, defendan-defendan telah menukar milik harta-harta tersebut kepada syarikat yang dikenali sebagai Kesang Corporation Bhd. Pada hari yang sama, harta-harta tersebut telah dipindah milik sekali lagi kepada pihak ketiga.
>
> 11. Pada waktu pindah milik kali kedua berlaku, defendan-defendan pertama, kedua dan keempat adalah juga merupakan pengarah-pengarah Kesang Corporation Bhd. Malahan, plaintif mengatakan bahawa defendan pertama adalah pada setiap masa yang berkenaan merupakan 'alter ego' syarikat-syarikat kumpulan Kesang.

[50] Now, if we were to examine para 12 closely, notwithstanding what are averred in paras 10 and 11 of the statement of claim, it is clear that the alleged transfer of the two apartments from the plaintiff to Kesang Corporation Bhd is *not* the subject-matter of the plaintiff's complaint. The subject-matter of the plaintiff's complaint, to repeat what I have stated earlier, is what is alleged in the BUTIR-BUTIR (the particulars) at para 12 of the statement of claim, that is to say, the alleged transfer of the two apartments from Kesang Corporation Bhd to *third parties*. If the alleged transfer of the apartments to the third parties was allegedly a wrongdoing by the first defendant in cahoot with the other defendants, by virtue of their position as directors of Kesang Corporation Bhd, then it is a wrongdoing (if at all there is any wrongdoing) by the first defendant (as well as by the other defendants) to Kesang

Corporation Bhd and not to the plaintiff (Kesang Leasing Sdn Bhd). Kesang Corporation Bhd should have been the plaintiff in the present case, and not Kesang Leasing Sdn Bhd.

Plaintiff's claim dismissed with costs.

Reported by Mashrifah Ravendran